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NATURE'S PATH FOODS, INC.
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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
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17 MOLLY BROWN, PARSA MILLER, and
18 LAUREN MORGAN as individuals, on behalf
of themselves, the general public and others
19 similarly situated,

20 Plaintiff,

21 v.

22 NATURE'S PATH FOODS, INC.,

23 Defendant.
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Case No. 4:21-cv-05132-HSG

CLASS ACTION

**DEFENDANT NATURE'S PATH
FOODS, INC.'S NOTICE OF
SUPPLEMENTAL AUTHORITY**

Pursuant to Local Rule 7-3(D), Defendant Nature's Path Foods, Inc. ("Nature's Path") submits this Notice of Supplemental Authority in support of its Motion to Dismiss, filed on August 27, 2021 (ECF No. 18.). Plaintiffs filed their Opposition on September 17, 2021 (ECF No. 23), and Nature's Path filed its Reply on October 7, 2021 (ECF No. 26.) This Court granted Nature's Path's Administrative Motion for Leave to File this Notice of Supplemental Authority on January 25, 2022. (ECF No. 39.)

Nature's Path respectfully notifies the Court of recently-posted guidance from the Food & Drug Administration regarding methods for calculating protein content for front label claims. On January 11, 2022, the FDA posted a web page titled "Industry Resources on the Changes to the Nutrition Facts Label." The guidance explains that FDA regulations permit either the nitrogen method or the amino acid method for calculating protein content for front label claims. A true and correct copy of the FDA's guidance is attached as **Exhibit A**¹. The web page states:

Label Claims

There are separate methods for determining the number of grams of protein in a serving for declaration on the Nutrition Facts label and for determining the percent Daily Value of protein for the Nutrition Facts label (21 CFR 101.9(c)(7)). Which method should be used when calculating protein values for use in protein nutrient content claims?

The regulation for nutrient content claims in 21 CFR 101.13(o) states that, except as provided in 21 CFR 101.10, compliance with requirements for nutrient content claims in this section and in the regulation in subpart D of this part, will be determined using the analytical methodology prescribed for determining compliance with nutrition labeling in 21 CFR 101.9.

By design, 21 CFR 101.9(c)(7) specifically provides for two different methods for determining protein values. The regulation states, in 21 CFR 101.9(c)(7), that protein content may be calculated on the basis of the factor 6.25 times the nitrogen content of the food as determined by the appropriate method of analysis as given in the "Official Methods of Analysis of the AOAC International," except that when official AOAC procedures described in 21 CFR 101.9(c)(7) require a specific factor other than

¹ <https://www.fda.gov/food/food-labeling-nutrition/industry-resources-changes-nutrition-facts-label#LabelClaims> (noting that the content is current as of 01/11/22 and the "following are resources and the most frequently asked questions we have received via our inquiry form, and during presentations made to various stakeholder groups.").

1 6.25, that specific factor shall be used. Additionally, 21 CFR
2 101.9(c)(7)(ii) provides the method for determining protein content
3 using the protein digestibility-corrected amino acid score for use in
calculating the percent Daily Value.

4 Determination of compliance for protein nutrient content claims
5 will be based on the use of the methods provided in 21 CFR
6 101.9(c)(7), including either of the methods mentioned above.

7 Dated: January 25, 2022

MORRISON & FOERSTER

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10 By:



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13 NATURE'S PATH FOODS, INC.
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